

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

ARNOLD-TOTH V. TOTH

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

AMANDA D. ARNOLD-TOTH, APPELLANT,  
V.  
WILLIAM R. TOTH, APPELLEE.

Filed August 21, 2012. No. A-11-741.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge.  
Affirmed.

James M. Buchanan, P.C., L.L.O., for appellant.

John A. Kinney and Jill M. Mason, of Kinney Law, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

**I. INTRODUCTION**

This appeal arises from an action initiated in district court by Amanda D. Arnold-Toth (Amanda) to modify the decree of dissolution which granted Amanda and William R. Toth (William) joint custody of their minor children. After a hearing, the district court modified the decree such that William was awarded custody of the parties' children and was permitted to remove the children to Florida.

Amanda appeals from the district court's order. However, in her brief to this court, Amanda failed to properly assign any errors for our review. As a result, we have reviewed the district court's decision concerning custody of the children for plain error. Having found no plain error, we affirm the judgment of the district court.

## II. BACKGROUND

In December 2008, the district court entered an order dissolving the marriage between Amanda and William. As a part of that order, the parties were granted joint legal and physical custody of their two minor children.

In April 2009, Amanda filed an application to modify the decree of dissolution. In the application, Amanda alleged that since the entry of the decree, the parties had been unable to agree and make joint decisions for the children and that the parenting plan had failed to provide necessary stability and consistency for the children. Amanda requested that the district court modify the decree to award her sole custody of the children.

Shortly after Amanda filed her application to modify the decree, William filed an answer and countercomplaint. William requested that the district court modify the decree to award him custody of the children. He alleged, among other things, that Amanda had denied him his scheduled parenting time and had made decisions concerning the children without consulting him. He indicated that joint custody was no longer an option for the parties.

In February 2011, prior to the trial on the parties' applications to modify the decree, William filed an amended countercomplaint. He alleged that he is a physician in the U.S. Air Force and that he had recently received orders to relocate to Florida. He requested that he be granted custody of the children and that he be permitted to move with the children to Florida.

In March 2011, a trial was held. Prior to the start of the trial, the parties agreed to bifurcate the issue of custody from the issue of removal of the children to Florida. As such, at this trial, the only issue before the district court was whether to modify the decree which had granted the parties joint custody by awarding sole custody to either Amanda or William.

At trial, both Amanda and William presented evidence which demonstrated that since the entry of the decree, they had been unable to work together to make decisions concerning the children. Specifically, they had been unable to agree about such things as where the children should attend school, which doctor should provide for the children's medical care, how to manage the children's schedules, what movies and video games the children should be exposed to, and how to discipline the children.

The parties presented conflicting evidence about why they had been unable to agree on decisions concerning their children. Amanda presented evidence to demonstrate that William refused to cooperate with her and intentionally failed to follow the parenting plan set out in the decree. She also presented evidence to demonstrate that William was manipulative and that he made decisions about the children without consulting her. To the contrary, William presented evidence to demonstrate that Amanda refused to cooperate with him and attempted to deny him his scheduled parenting time. In addition, he presented evidence that Amanda's mental health was unstable and that she had made decisions that were not in the children's best interests.

After the trial, the district court entered an order modifying the decree such that William was granted sole custody of the parties' children. Amanda was awarded 3 hours of supervised visitation per week pending her participation in individual therapy.

In July 2011, a second trial was held. This trial focused on William's request to remove the children to Florida for his job with the Air Force. At this trial, the parties presented evidence about their relationships with the children and about the children's lives in Nebraska. In addition,

William presented evidence about his potential residence in Florida and about the necessity of his moving to Florida for his job. William also presented evidence to demonstrate that Amanda had engaged in certain erratic behavior since the entry of the modified custody order in March 2011.

After this trial, the district court entered a second order granting William's motion to remove the children to Florida. The court indicated that William "met his burden of proof in establishing both the economic necessity of relocation, and that this action would be in the minor children's best interests."

Amanda appeals from the district court's orders granting William sole custody of the children and permitting him to relocate to Florida with the children.

### III. ASSIGNMENTS OF ERROR

Amanda failed to specifically assign errors in her brief on appeal.

### IV. ANALYSIS

The Nebraska Constitution provides that the Supreme Court may promulgate rules of practice and procedure "[f]or the effectual administration of justice and the prompt disposition of judicial proceedings . . . ." Neb. Const. art. V, § 25. The rules adopted by the Supreme Court address, among other topics, the procedure for appealing decisions of the district court. The court has established such rules to ensure that all parties have an opportunity to have their arguments heard.

In this case, the appellant, Amanda, has provided this court with a brief which is not in compliance with the Supreme Court's rules. See Neb. Ct. R. App. P. § 2-109 (rev. 2012). The primary problem with Amanda's brief is that it does not contain any assignments of error.

Neb. Ct. R. App. P. § 2-109(D)(1) mandates that an appellant's brief shall contain the following sections, under appropriate headings, and in the order indicated:

(b) A table of contents with page references, and an alphabetically arranged table of cases, statutes, and other authorities cited, with references to the pages of the brief where cited;

....

(e) A separate, concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed. . . .

....

(h) [A] summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief and which must not merely repeat the argument headings. . . ; and

(i) The argument shall present each question separately, and shall present each proposition of law as best sets forth the contentions of the party.

In addition to court rules, state law provides that an appellant's brief "shall set out particularly each error asserted and intended to be urged for the reversal, vacation, or modification of the judgment." Neb. Rev. Stat. § 25-1919 (Reissue 2008).

It has long been the rule in Nebraska appellate courts that to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. See, e.g., *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006); *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006); *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005); *State ex rel. Medlin v. Little*, 270 Neb. 414, 703 N.W.2d 593 (2005); *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004); *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). The failure to properly and specifically assign errors has resulted in the appellate courts of this state declining to address an issue raised only in the argument of the appellant's brief. See, e.g., *White v. White, supra*; *Heitzman v. Thompson, supra*; *State ex rel. Medlin v. Little, supra*.

In her appellate brief, Amanda failed to properly include an assignment of error section under an appropriate heading and in the proper order specified by the Supreme Court. Indeed, Amanda failed to include an assignment of error section at all. Amanda did include an argument and a summary of that argument, in which she asserted that the district court erred in awarding William custody of the parties' children and in permitting him to remove the children to Florida. However, these sections fail to satisfy the requirement that to be considered on appeal, an issue must be specifically assigned as error *and* specifically argued.

Because Amanda did not specifically assign any errors in her appeal to this court, we do not address the assertions raised in the argument section of her brief. However, our analysis does not end there. Although Amanda has not assigned any errors, an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

Because this case involves a determination concerning custody of the parties' two young children, and, as such, necessarily involves a determination of the children's best interests, we have thoroughly and completely reviewed the record for plain error and have found none. Our review of the record revealed that although there was conflicting evidence presented concerning the parties' parenting styles and their interactions with each other after the decree was filed, there was sufficient evidence to support the district court's decision to award sole custody of the children to William and to permit William to relocate to Florida with the children.

## V. CONCLUSION

Amanda did not assign any errors in her appeal to this court. As a result, we have reviewed the district court's decision concerning custody of the parties' children for plain error. Having found no plain error, we affirm the district court's order.

AFFIRMED.